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In the Supreme Court of the United States

OCTOBER TERM, 1936.

No. [redacted] 48

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

MABEL S. ANDREWS,
Executrix of the Estate of Matthew Andrews,
Deceased.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

BRIEF FOR MABEL S. ANDREWS, EXECUTRIX OF THE ESTATE OF MATTHEW ANDREWS, DECEASED, IN OPPOSITION.

FRED R. SEIBERT,
Attorney for Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, deceased.

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OPINION BELOW.

The opinion of the Court of Claims of the United States (R. 5-11) is reported in 17 Fed. Supp. 980.

JURISDICTION.

The judgment of the United States Court of Claims was entered February 8, 1937 (R. 11). Petition for writ of certiorari was filed May 8, 1937. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED.

Whether under the facts in this case, the basis of suit was incorporated in a timely claim for refund as subsequently amended.

STATUTES INVOLVED.

The statutes involved will be found in the Appendix, *infra*, pp. 10-11.

STATEMENT.

The facts were stipulated and the Court made and entered special findings of fact as part of its judgment (R. 5-8). The pertinent facts may be summarized as follows:

On or about March 15, 1931, respondent as Executrix of the Estate of Matthews Andrews, deceased, filed an individual income tax return for the calendar year 1930, showing a total tax liability of $12,800.30 which was duly paid in quarterly installments. The gross income shown on the return included the amount of $110,891.50, representing dividends from domestic corporations, $36,750.00 of which was erroneously reported as dividends received from The M. A. Hanna Company. This amount was derived from the sale of shares of stock of The M. A. Hanna Company received as a result of a re-capitalization of the Company in November and December, 1929 (R. 6).

In December 1931, respondent was advised by the Internal Revenue Agent in Charge that the return as filed, reporting the sum of $36,750.00 as dividends from The M. A. Hanna Company was considered as correct, with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C., and that should subsequent information be received which would materially change the amount of tax reported, it would be necessary, under existing laws, to redetermine the tax liability.

On June 15, 1932, respondent filed with the Collector of Internal Revenue a claim for refund in the amount of $420.00 on the ground that the profit resulting from the sale of 700 shares of the common stock of the Hanna Company had been incorrectly computed. This claim for $420.00

was allowed in full, Certificate of Overassessment issued by the Commissioner of Internal Revenue September 24, 1932 and paid with interest.

In a letter dated October 6, 1932, following conferences with representatives of The M. A. Hanna Company, the Commissioner of Internal Revenue advised the Internal Revenue Agent in Charge, at Cleveland, Ohio, that the amounts of cash received by respondent and other shareholders of the Hanna Company, as above stated, represented proceeds from the sale of the fractional shares of new stock, and that gain or loss from such sale should be determined upon the basis of the original stock in the hands of the respondent and the other shareholders.

On or about February 2, 1933, respondent filed a claim for refund in the amount of $995.52 based upon the grounds that losses had been sustained upon investments in stocks of certain corporations (R. 7). Subsequently, in 1936, this claim was rejected in part and allowed in part (R. 7).

On June 29, 1934, respondent filed a claim for refund in the amount of $6,454.90, which amount included the $995.52 on which claim was filed on February 2, 1933. This claim for $6,454.90 was filed as an amendment and amplification of claim for refund filed February 2, 1933. The basis of this claim was that the amount of $36,750.00 had been erroneously included as a dividend instead of being reported as proceeds from the sale of shares of stock of The M. A. Hanna Company (R. 7-8), and, as above stated, included the amount of $995.52 on which claim was filed on February 2, 1933. By letter dated November 2, 1935, respondent was advised by the Commissioner that while the merits of the claim were allowable it would be disallowed in full for the reason that it did not, in the opinion of the Commissioner, meet the requirements of the law. The claim was officially rejected by the Commissioner on December 16, 1935.

ARGUMENT.

The Court of Claims Properly Held, under the Facts in the Case, that the Basis of Suit was Incorporated in a Timely Claim for Refund as Subsequently Amended.

On February 2, 1933 respondent filed a claim for refund (R. 7). On June 29, 1934, while the claim of February 2, 1933 was being considered by the Commissioner, respondent filed a claim for refund stating therein as the basis, in addition to the basis stated in the claim of February 2, 1933, the grounds upon which suit was brought (R. 7-8). The second claim specifically related itself to the first. The Court of Claims held that under the circumstances the second claim was a proper amendment to the first and allowed recovery thereon.

The Court of Claims found as a part of its special findings of fact, that respondent was notified in December 1931, by letter from the Internal Revenue Agent in Charge at Cleveland, Ohio, that her return as filed reporting the sum of $36,750.00 as dividends was considered as correct with the added proviso that such finding was subject to the approval of the Bureau of Internal Revenue in Washington, D. C. and that should subsequent information be received which would materially change the amount of tax reported it would be necessary, under existing laws to redetermine the tax liability.

As the result of conferences with representatives of The M. A. Hanna Company, the Commissioner of Internal Revenue, by letter dated October 6, 1932, advised the Internal Revenue Agent in Charge at Cleveland, Ohio that the amounts of cash received by plaintiff and other shareholders of the Hanna Company represented proceeds from the sale of stock and that gain or loss from such sale should be determined (Fdg. 6, R. 6). This information was not conveyed to respondent although a promise was made by the Internal Revenue Agent in Charge in his letter of

December 1931, that should any facts be discovered which would change the tax liability, an adjustment would be made. The determination by the Commissioner that the dividends had been erroneously reported was made prior to the expiration of the statutory period within which a refund should have been allowed without the filing of a claim therefor, as provided in Section 322(a) of the Revenue Act of 1928 (Appendix Paragraph 1).

The Court of Claims in allowing recovery in the instant case followed its previous decisions in the case of *Youngstown Sheet and Tube Company v. United States,* 79 C. Cls. 683, certiorari denied 293 U. S. 599 and *Con. P. Curran Printing Company v. United States,* 15 Fed. Sup. 153, and cited in support thereof the decisions of this Court in *United States v. Memphis Cotton Oil Company,* 288 U. S. 62; *United States v. Factors and Finance Company, Inc.,* 288 U. S. 89 and *Bemis Brothers Bag Company v. United States,* 289 U. S. 28, wherein amendments of claims were permitted under certain facts and circumstances which were not essentially different from those present in this case.

Petitioner cites the case of *United States v. Henry Prentiss and Company,* 288 U. S. 73, as being contra to the decision of the court in this case. An examination of the opinion of the Court in the *Henry Prentiss and Company* case, discloses that the principle enunciated in that case does not apply under the facts in the instant case.

The first and only timely claim for refund filed in the *Prentiss* case, *supra,* was for special relief under Sections 327 (d) and 328 of the Revenue Act of 1918, which claim was sought to be turned by amendment after the statute had run to include a demand for refund which had come about through the undervaluation of invested capital with a consequent increase of the profits to be taxed. This

Court in denying the right to amend the claim very specifically stated its reasons as follows:

> "If the amendment is permissible, a request for the exercise of a discretionary jurisdiction will have been turned after the running of the statute * * * into a claim of error of law or fact and hence into a controversy within the jurisdiction of a court. What at the beginning was non-justiciable with exceptions few and narrow * * * will have become justiciable at the end."

In the instant case the issue presented in the original timely claim was an error of fact or law or both and resulted in a new audit of the entire case. The controversy in the present case was at all times within the jurisdiction of the Court. Furthermore in the *Prentiss* case the taxpayer by agreement prior to the filing of the amendment abandoned all grounds for refund except special assessment.

The Circuit Court of Appeals, Ninth Circuit, in the case of *Garbutt Oil Company v. United States,* decided April 28, 1937, allowed recovery of overpaid taxes on grounds set up in amendment to a timely claim after the expiration of the statutory period for filing a new claim. The facts in that case were similar to those in the instant case. That Court as did the Court of Claims in the present case relied upon the decision of this Court in the case of *Memphis Cotton Oil Company, supra.*

The petitioner in its brief has cited *Bryant Paper Company v. Holden,* 63 Fed. (2nd) 370 (C. C. A. 6th), certiorari denied 290 U. S. 631, *United States v. Richards,* 79 Fed. (2nd) 797 (C. C. A. 6th), certiorari denied 297 U. S. 718, *Swedish Iron and Steel Corporation v. Edwards,* 1 Fed. Supp. 335 and *New York Trust Company, Executor v. United States of America,* 87 Fed. (2nd), 889, in its contention that there is a diversity of opinion among the different courts as to the question in issue.

In the *Bryant Paper Company* case, *supra,* a claim was timely filed. Before the claim was rejected but after the statutory period for filing a new claim had expired another claim was filed asking for refund on a ground not in issue prior thereto. The second claim did not seek to relate itself to the first and appeared in the record as an independent claim. In the instant case the amended claim specifically related itself to the original and timely claim and covered an issue which had previously and within the statutory period been determined by the Commissioner.

In the *Richards* case, *supra,* a general claim had been filed within the statutory period. Later a specific claim was filed based on reallocation of dividends, an issue not in existence at the time of the filing of the general claim. This claim was rejected with permission to reopen it upon presentation of further evidence relative to allocation of dividends. When the taxpayer requested reopening he urged also on additional and unrelated grounds, namely, that he was entitled to a deduction of his share of excess profits taxes paid by two partnerships of which he was a member.

The Court held that the letter of the Commissioner rejecting the second claim barred further amendment except as limited in such letter and in its opinion on page 801 stated:

> "The Commissioner's rejection letter of June 3, 1925, was concededly not a final rejection of the claim based upon the disallowance as a deduction of corporation dividends. It was qualified by permission to reopen in the event that the allocation of dividends should thereafter be definitely determined."

An examination of the facts in the *Swedish Iron and Steel Company* case, *supra,* discloses that a timely claim for refund was filed and rejected on its merits. Later and after the statutory period for the filing of a new claim had

expired, letters were filed asking for a reaudit and reconsideration for the year involved. The Court held that since the letters were filed after the rejection of the original claim and after the expiration of the statutory period, that such letters could not constitute an amendment to the already rejected claim. It is respectfully submitted that the facts and principle involved in the *Swedish Iron and Steel Corporation* case are not comparable in any respect to those in the instant case.

In the *New York Trust Company* case, *supra,* a timely claim for refund had been filed and allowed in full. Later an alleged amendment was filed based upon claim for deduction of taxpayer's proportionate share of excess profits taxes. The Court held that even if the timely claim had not been rejected at the time of the filing of the alleged amendment to determine the merits of the amendment the Commissioner would be required to examine the records of another taxpayer and would be led into fields too far removed from those which the original claim directed. In the instant case the Commissioner and his agents had of their own volition determined the correct tax basis on the issue in suit. When the amendment to the original timely claim was filed the Commissioner was not led into strange and unexplored paths because within the statutory period he had determined the correct basis for the determination of the tax liability. The amendment was simply an adaptation of the relief to a case already determined by the Commissioner.

The petitioner on page 10 of its brief states that Treasury Decision 4265 which sets up the requirements of claims for refund has the force of law. We respectfully submit that such regulations can not have the force of law and cite in support thereof this Court's opinion in the case of *Manhatten General Equipment Company v. Commissioner,* 56 S. Ct. 397, which stated in part as follows:

"The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. * * * And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable."

The Court of Claims in the case of *American Safety Razor Corporation v. United*, 6 Fed. Supp. 293, reaffirmed in 7 Fed. Supp. 196, in refusing to follow Treasury Decision 4235 stated as follows:

"* * * Upon reason and authority, we are clear that the treasury decision was merely an erroneous construction of the statute by an administrative department and is not binding upon the plaintiff.

"What we have said above is not in accordance with the view taken in *Heebner v. United States*, 50 Fed. (2nd) 904. We do not agree with the doctrine laid down therein and do not think that a taxpayer is bound to take notice of treasury decisions in legal questions, or that even actual knowledge thereof would make them more binding."

This decision (*supra*) was followed by the Circuit Court of Appeals, Second Circuit in *Watts v. United States*, 82 Fed. (2d) 266.

CONCLUSION.

The opinion of the Court below is correct and is in accord with the principles established by this Court; the petition should, therefore, be denied.

Respectfully submitted,

FRED R. SEIBERT,
Attorney for Mabel S. Andrews, Executrix of the Estate of Matthew Andrews, deceased.

APPENDIX.

Revenue Act of 1928, C. 852, 45 Stat. 861.

SEC. 322. REFUNDS AND CREDITS.

"(a) Authorization. Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installments thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

"(b) Limitation on allowance.

"(1) Period of Limitation. No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer."

Revenue Act of 1932, C. 209, 47 Stat. 169.

SEC. 1103. LIMITATIONS ON SUITS BY TAXPAYERS.

"(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expira-

tion of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."